

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson III

Opinion No. 2015-up-204

Filed May 27, 2015

RECEIVED

JUN 29 2015

SC Court of Appeals

Robert F. Spigner,.....Appellant,

v.

South Carolina Dept. of
Probation, Parole and Pardon Services,.....Respondent.

APPENDIX

1. Order, South Carolina Court of Appeals, dated April 15, 2015 - PP. 1-3
2. Petition for Rehearing, South Carolina Dept. of Probation, Parole,
and Pardon Services - PP. 4-10.
3. Return to Respondent's Petition for Rehearing, dated April 27, 2015 -
PP. 11-22.
4. Order, South Carolina Court of Appeals, dated May 27, 2015. PP. 23-26.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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April 15, 2015

Robert F. Spigner, 65500
Broad River Correctional Institution
Columbia SC 29210

Mr. Tommy Evans, Jr., Esquire
PO Box 50666
Columbia SC 29250

Re: Robert Spigner v. SCDPPPS
Appellate Case No. 2013-001380

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Jana E. Shealy

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert F. Spigner, Appellant,

v.

South Carolina Department of Probation, Parole and
Pardon Services, Respondent.

Appellate Case No. 2013-001380

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Unpublished Opinion No. 2015-UP-204
Submitted March 1, 2015 – Filed April 15, 2015

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Robert F. Spigner, pro se

Tommy Evans, Jr., of the South Carolina Department of
Probation, Parole and Pardon Services, of Columbia, for
Respondent.

PER CURIAM: Robert F. Spigner appeals an order of the Administrative Law
Court (ALC) affirming the denial of his parole. Spigner argues the ALC erred by

(1) failing to find the parole board violated section 24-21-10(F)(1) of the South Carolina Code (Supp. 2014) because it failed to use COMPAS,¹ the risk assessment tool adopted by the South Carolina Department of Probation, Parole and Pardon Services (the Department), in reaching his parole decision; (2) failing to find the parole board violated his due process rights by reaching his parole decision before interviewing him; and (3) failing to find the parole board considered improper criteria in reaching his parole decision. Spigner also argues the ALC did not impartially consider his case. We affirm in part, reverse in part, and remand.²

1. As to issue one, we find section 24-21-10(F)(1) requires the parole board to evaluate an inmate's risk using the Department's adopted assessment tool in reaching a decision to grant or deny parole. See § 24-21-10(F)(1) ("The [D]epartment must develop a plan that includes the . . . establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, *which the parole board shall use in making parole decisions . . .*" (emphasis added)). Because the ALC failed to make this finding, its order is affected by an error of law. We therefore reverse as to this issue and remand to the parole board for a new parole hearing. The parole board is ordered to evaluate Spigner's risk using the Department's assessment tool and consider the results of the evaluation in reaching its decision regarding Spigner's parole. See *James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 564, 566, 660 S.E.2d 288, 290 (Ct. App. 2008) ("Section 1-23-610 of the South Carolina Code . . . sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency."); S.C. Code Ann. § 1-23-610(B)(d) (Supp. 2014) ("The court of appeals . . . may reverse or modify the [ALC's] decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . affected by other error of law . . ."); *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2008) (holding an inmate has a state-created liberty interest in requiring the parole board to adhere to statutory criteria in rendering a decision).³

¹ COMPAS is an acronym for "Correctional Offender Management Profiling for Alternative Sanctions."

² We decide this case without oral argument pursuant to Rule 215, SCACR.

³ The Department argues that under section 1-23-600(D) of the South Carolina Code (Supp. 2014), the ALC did not have jurisdiction to hear Spigner's appeal.

2. As to issue two, we find substantial evidence supports the ALC's finding that the parole board did not reach a decision regarding Spigner's parole prior to his interview and hearing. *See* § 1-23-610(B) ("The court [of appeals] may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact."); § 1-23-610(B)(e) (holding this court may reverse or modify the ALC's finding of fact only if it affects a substantial right of the appellant and is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"). As a result, no due process violation occurred.

3. As to issue three, we affirm the ALC's finding the parole board did not consider any improper criteria in reaching Spigner's parole decision. *See* S.C. Code Ann. § 24-21-640 (Supp. 2014) ("The [parole] board must carefully consider the record of the prisoner *before*, during, and after imprisonment . . ." (emphasis added)); *id.* ("The [parole] board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records."); *Brown v. S.C. Dep't of Health & Envl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration."); *Clarendon Cnty. ex rel. Clarendon Cnty. Assessor v. TYKAT, Inc.*, 394 S.C. 21, 26 n.2, 714 S.E.2d 305, 308 n.2 (2011) (holding if the ALC fails to rule on an issue properly before it, a party must file a Rule 59(e), SCRCP, motion requesting such a ruling to preserve the issue on appeal).

See § 1-23-600(D) ("An administrative law judge shall not hear . . . an appeal involving the denial of parole to a potentially eligible inmate by [the Department]."). We disagree. *See Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 630, 733 S.E.2d 211, 218 (2012) ("[A] matter is reviewable by the ALC where an inmate's appeal *also* implicates a state-created liberty or property interest . . ."); *Cooper*, 377 S.C. at 499, 661 S.E.2d at 112 (holding an inmate has the right to require the parole board to adhere to statutory requirements in rendering a decision, and failure by the board to consider the requisite statutory criteria constitutes an infringement of a state-created liberty interest and warrants minimal due process procedures).

4. We find no evidence of bias by the ALC in this case. See *Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) ("The burden of proof is on the appellant to convince [an appellate court] that the lower court was in error."); *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009) ("It is not sufficient for a party . . . to simply allege bias; rather, the party must show some evidence of bias or prejudice." (internal quotation marks omitted)); *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) ("The fact a [court] ultimately rules against a litigant is not proof of prejudice by the [court], even if it is later held the [court] committed error in [its] rulings.").

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

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State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



JERRY B. ADGER
Director

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April 23, 2015

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Robert Spigner v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the *Petition for Rehearing*, dated April 23, 2015, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tommy Evans, Jr.".

Tommy Evans, Jr.
Assistant General Counsel

Enclosures

cc: Robert Spigner

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph K. Anderson, III

APPELLATE CASE NO. 2013-001380

Unpublished Opinion No. 2015-UP-204
Submitted March 1, 2015 – Filed April 15, 2015

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES.....RESPONDENT

v.

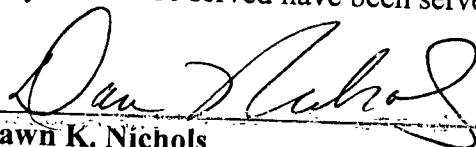
ROBERT F. SPIGNER.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, certify that I have served the
within Petition for Rehearing, dated April 23, 2015, by depositing a copy of the same in the
United States mail, postage prepaid, this 23rd day of April, 2015, addressed to:

Robert Spigner, #65500
Broad River Correctional Institution
4460 Broad River Road
Columbia, S.C. 29210

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Administrative Assistant

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph K. Anderson, III

APPELLATE CASE NO. 2013-001380

Unpublished Opinion No. 2015-UP-204
Submitted March 1, 2015 – Filed April 15, 2015

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES.....RESPONDENT

v.

ROBERT F. SPIGNER.....APPELLANT

PETITION FOR REHEARING

Respondent, the South Carolina Department of Probation, Parole and Pardon Services (Department) respectfully petitions the Court for a rehearing pursuant to Rule 221(a), SCACR. This petition is submitted on the grounds that the Appellant recently appeared before the Parole Board, in which a COMPAS assessment was considered. The decision of the Court remanding the case to the Board for a new hearing should be considered moot. The fact he would receive a subsequent hearing pursuant to South Carolina law was something this Court was not aware of prior to making this decision. Based on the reasons set forth below, the Department respectfully

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asks this Court to grant this Petition for Rehearing and reconsider their prior decision remanding the case to the Board for another hearing.

Procedural History

On September 8, 1971, the Appellant Robert Spigner appeared before the Honorable Wade Weatherford for the offense of murder. Pursuant to South Carolina law, the Court sentenced the Appellant to a term of imprisonment for the remainder of his natural life. At the time he committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of ten years.

The Appellant appeared before the Board on October 10, 2012, parole was denied due to, 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 3) the use of a deadly weapon in this or a previous offense; 4) a prior criminal record indicating poor community adjustment; and 5) a failure to successfully complete a community supervision program. Upon receiving this denial the Appellant filed a notice of appeal before the Administrative Law Court (ALC). In the ALC appeal, the Appellant alleged the Board failed to consider a risk assessment pursuant to South Carolina law.¹ On May 24, 2013, the Honorable Ralph K. Anderson, III issued an order affirming the decision of the Parole Board.

This decision was appealed to this Court. This court decided without oral argument pursuant to Rule 215, SCACR² that the Board failed to complete or consider a risk assessment in violation of South Carolina law. On April 15, 2015, this court issued an unpublished opinion

¹ The department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions. S.C. Code Ann. §24-21-10(F)(1)(2012)

² The appellate court may decide any other case without oral argument if it determines that oral argument would not aid the court in resolving the issues. Rule 215 SCACR.

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reversing in part and remanding the case to the Parole Board for another hearing. This petition for rehearing follows.

Request for Reconsideration

This Court made the determination that the Board erred in denying parole without considering a risk assessment, and ordered a new hearing in which a risk assessment must be considered.

Prior to this decision, the Appellant again appeared before the Board on January 15, 2015. Before this hearing a parole examiner met with the Appellant to complete a COMPAS risk assessment. Upon completion of this assessment the results was provided to the Board. These results were considered prior to the denial of parole. Since the Appellant has appeared before the Board, where COMPAS was considered, the decision of this Court is now moot, so we respectfully request this Court reconsider its prior decision.

The Department argues this case should be considered moot because its ruling will not change the Appellant's current situation. The Department does not expect the Board to release the Appellant on parole with the identical facts they considered only four months ago. A case becomes moot when judgment, if rendered will have no practical effect upon the existing controversy. *Mathis v. South Carolina State Highway Dept.*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). Since he just had a hearing where a COMPAS assessment was considered, this ruling does not present the Appellant any relief. Before any action can be maintained, there must exist a justiciable controversy. *Midland Guardian Co. v. Thacker*, 280 S.C. 563, 567, 314 S.E.2d 26, 28 (Ct. App.) *cert. denied*, (1984). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination as distinguished from a dispute or difference of a contingent hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249

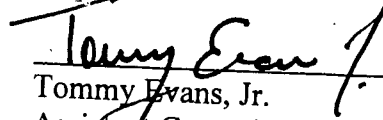
S.C. 561, 155 S.E.2d 618 (1967). The Appellant has just appeared before the Board in January. It is highly unlikely that the Board would award parole to a prisoner they just denied only months ago unless new facts are presented. There will be no new factors presented in a second hearing. The decision of the Court would not bring any relief to the Appellant, so this case should be considered moot and reconsidered by this Court.

Due to its mootness, and in the interest of judicial economy, the Department respectfully requests this Court reconsider its previous decision. The Department requests the Court not order the commencement of another hearing. The Department wishes this Court grants this motion and allow the current decision to remain, except the order of commencing another Parole hearing. A hearing has just been held, in which the Board has considered all the criteria including a risk assessment denied parole. It would be unnecessary to conduct another hearing, which would garner an identical result.

Conclusion

WHEREFORE, the State respectfully requests this Court grant the Petition for Rehearing, and reconsider its earlier decision remanding the case back to the Parole Board for another hearing.

Respectfully submitted



Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
April 23, 2015

Return to Respondent's Petition for Rehearing
~~Petition for Rehearing was received by the~~
Appellate on April 27, 2015.

S.C. Dept. Probation, Parole
and Pardon Services.
Respondent

Robert F. Spigener
Appellate

Unpublished Opinion No. 2015-UP-204
Submitted March 1, 2015 - Filed April 15, 2015

The State of South Carolina
In the Court of Appeals
Appeal from the Administrative Law Court
The Honorable Ralph K. Anderson III
Appellate Case No. 2013-001380

Procedural History

On September 8, 1971, the Appellant appeared before the Hon. Wade Weatherford, he sentenced Appellate to Life with eligibility for Parole after 10 years.

In October of 2000, Appellate was violated on Parole. The violation was technical reasons.

From October 2000 until October 2012 Appellate appeared before the Parole Board six (6) times. Upon after being denied in October 2012, Appellate filed Notice of Appeal with the A.H.C. Appellate raised three (3) issues in his Appeal:

- (1) The Board failed to give Appellate COMPAS.
- (2) Appellate Parole was decided prior to being interviewed.
- (3) The Board failed to use the Criteria that applies to Parole violators.

On April 15, 2015 this Court reversed in part, Affirmed in part Appellate's Appeal. Ordering a new Parole Hearing.

The Board filed Petition for Rehearing on April 23, 2015. Petitioner received a copy of the Petition on April 27, 2015. This Return follows:

REQUEST THAT THE REHEARING BE DENIED

The Respondent rest it's petition for a rehearing on one salient position, this being: Appellant Spigner appeared before the Parole Board on January 15, 2015 for Parole review subsequent to the Parole review of October 10, 2012, which is the underlying issue of the Appellate Case Opinion No. 2015-UP-204, and during the January 15, 2015 parole review the Parole Board correctly applied the COMPAS Assessment in denying parole to Appellant Spigner as a result of the January 15, 2015 parole review examination. The Respondent further presses it's position that because it did not release the Appellant Spigner on Parole as a result of applying the COMPAS Assessment in the January 15, 2015 parole review, then it logically follows that the Respondent would not have granted Parole to Appellant Spigner under any set of circumstances even if it had correctly applied the COMPAS Assessment during the October 10, 2012, Parole Review Examination of Appellant Spigner and therefore conducting a new Parole hearing is a nullity and an exercise in futility.

The Respondent seems to draw a direct correlation between the results of the Jan. 15, 2015 Parole Review and the results of the Oct. 10, 2012 Parole Review

The Reasoning and Approach of the Respondent in taking this position is both illogical and nonsensical in the context of sound reasoning, and prohibited by the Operations Manual of the S.C. Board of Paroles and Pardoners and S.C. Case Law. To follow the position asserted by the Respondent would result in Absurd and unreasoned decision makings, for Example: If the Parole Review of Jan 15, 2015 and Oct. 10, 2012 are directly connected such that the results of one necessarily dictates the results of the other, what would prevent the argument that the parole review of July 7, 1981 which granted parole release is directly connected to the Oct. 10, 2012 parole review such that the Appellant must receive parole release because the results of the July 7, 1981 directly dictates the results of Oct. 10, 2012. The Respondent is asking this Court to climb a slippery slope, and such a venture will result in chaos and confusion. What occurs in one parole review has absolutely no bearing upon a separate, previous and/or subsequent parole review. This is established by the S.C. Board of Paroles and Pardoners own Operations Manual. The Approach asserted by the Respondent is a decision making

Approach which is arbitrary and capricious and denies the fundamental concept of reasoned and fair process of adjudication.

The respondent ground for rehearing is not of the substance of matters for which petitions for rehearing are granted. The Appellant Seignen respectfully move this Court to deny the Respondent's petition for rehearing for the above reasons and for the following reasons below:

This Court in their decision dated Aug. 27, 2014, S.C. App (NO. 2014-40-326), Bagley v. S.C.D.P.P.S. 2014-WL-4217379, stated "However we find 24-21-10(F)(1) of the S.C. Code (Supp 2013) requires the Parole Board to evaluate an inmate's risk using the Department Adopted Assessment tool in reaching a decision to grant or deny parole." "Because the ALC failed to make this finding, its order is affected by an error of law, we therefore reverse and remand to the Parole Board for a new parole hearing." As with Bagley the Board failed to give Appellant the COMPAS. The Respondent now argues that since Appellant has had another parole review hearing and was given COMPAS that this Court should order that another hearing would be moot. Appellant would disagree, see Bagley "in its findings the Department notified this Court that Bagley is currently scheduled to receive a new parole hearing within the next ninety (90) days. Nothing in this opinion preclude the Parole Board from implementing the requirements of our decision at the upcoming proceeding in lieu of holding a separate hearing pursuant to this

decision. Because we are reversing Bagley's 2012 denial of parole, we direct the Parole Board not to consider the 2012 denial as a prejudicial factor in reaching it's decision at the upcoming proceeding or in future decisions". There is no way to know that the 2012 parole decision by the Board was not prejudicial to Appellant.

The Respondent's can not say with certainty that the facts will be the same as they were when Appellant went before the board in Jan. 15, 2015. The only thing that there appears to be any certainty is that the Respondent's with out even hearing or investigation have decided that "it would be unnecessary to conduct another hearing which would garner an identical results.

In determining whether or not this case should be given a rehearing this Court must take judicial notice of these facts as they effect the Appellant's request to be reinstated on Parole.

The Appellant is a Technical Parole violator. S.C. Board of Paroles and Pardons Operational Manual (2014) Page 45 in part states "A parolee can be in technical violation of the conditions of parole either because, through no fault of his/her own, she/he

Cannot satisfy some condition or another or because he/she has fallen short for whatever reason, of what is expected of him/her. In either case, revocation may be neither appropriate nor legally proper.

On page 46 of the S.C. Board of Paroles and Pardons Operational Manual, Title: REHEARING OF PAROLE CASES (C), AFTER ACQUIRED INFORMATION ABOUT THE PRISONER. This topic as well as the other topics discussed under this title demonstrates that another or the new hearing that was ordered is NOT A Moot issue.

This Court has to wonder why the Parole Board is so adamant about this being a moot issue. They state "It is highly unlikely that the Board would award parole to a prisoner they just denied only months ago unless new facts are presented", then "there will be no new factors presented in a second hearing". The Respondent's states "The Department does not expect the board to release the Appellant on Parole with the identical facts they considered only four (4) months ago"

The Statement Must Concern This Court Because

The Respondent's Action must be denied because unlike Bagley v. S.C.P.P.S., the Board was never ordered not to consider the 2012 Bone Herring that was ordered to be given over, we don't know if this was a pre-judicial factor or not. ~~There is no way that the~~ Respondent's (in spite that this is a moot issue. Appellant's right were violated, a new hearing using the (Carter) criteria is the only solution.

Conclusion

The Respondent's Action must be denied because unlike Bagley v. S.C.P.P.S., the Board was never ordered not to consider the 2012 Bone Herring that was ordered to be given over, we don't know if this was a pre-judicial factor or not. ~~There is no way that the~~ Respondent's (in spite that this is a moot issue. Appellant's right were violated, a new hearing using the (Carter) criteria is the only solution.

Conclusion

As a technical Bone Violator and the (Carter) that applies to technical Bone Violators being the (Criteria that must be used to determine Appellants' Bone), as well as the criteria set out in the 2014 Edition S.C. Board of Appeals and Pensions Operations Manual, The opportunities for Reinstatement on Bone is not a moot issue provide the (Carter) Criteria is used and the facts are presented in their entirety.

Appellants are responsible for preparing the Appellants file for review by the Board. The Appellant has grave concern over this fact, and with good reason the care of the Respondent management is there is no new evidence and this is a moot issue.

As a technical Bone Violator and the (Carter) that applies to technical Bone Violators being the (Criteria that must be used to determine Appellants' Bone), as well as the criteria set out in the 2014 Edition S.C. Board of Appeals and Pensions Operations Manual, The opportunities for Reinstatement on Bone is not a moot issue provide the (Carter) Criteria is used and the facts are presented in their entirety.

The State of South Carolina
 In The Court of Appeals
 Appellate Case No. 2013-001380

SPIGNER
 v
 APPELLATE

Certificate of Service

S.C.D.P.P.P.S.
 Respondent

Appellant, declares under penalty that he mailed
 a copy of his Return to Petition for Rehearing to
 the parties listed below clearly addressed.

The Honorable Jerry Kitchings
 Clerk of the South Carolina Court of Appeals
 P.O. Box 11629
 Columbia, S.C. 29211

Robert F. Spigner
 Broad River Court East
 4460 Broad River Rd
 Columbia, S.C. 29210

Mr. Tommy Evans Jr.
 2221 Devine St. Suite 600
 Columbia, S.C. 29250

Dated

cc: file

OPERATIONS MANUAL

SOUTH CAROLINA BOARD OF PAROLES AND PARDONS

SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES
DIVISION OF PAROLES AND PARDONS

January 2014

MODIFICATIONS OF PAROLE CASES

1. IN GENERAL

As in the case of continuations, violations of parole do not always result in revocation. Revocation of parole is generally reserved for the most serious violations, including: a new criminal conviction; repeatedly testing positive for drugs; absconding from supervision; and other such violations that threaten the safety of the community or demonstrate that the parolee is simply incorrigible or unwilling to make the effort to reform. A parolee can be in technical violation of the conditions of parole either because, through no fault of his/her own, he/she cannot satisfy some condition or another, or because he/she has fallen short, for whatever reason, of what is expected of him/her. In either case, revocation may be neither appropriate nor legally proper.

In such cases, modification of the conditions of parole may be the best solution. Modifications of parole serve two purposes: they respond to the parolee's individual rehabilitative needs as those needs change over time and modifications allow for parole to continue in a way that reasonably ensures the safety of the community, while saving the state the cost of incarcerating the offender. Where modification of parole seems to offer the best course, the law allows the supervising parole agent to issue a citation, instead of an arrest warrant, to bring the parolee before an administrative hearing officer, so that some appropriate modification can be made.

As a matter of policy, the Department prefers rather to continue cases on parole by modifying the conditions of supervision where that would be appropriate and reasonably likely to do some good, than to end them by resorting to the most severe expedient of revocation.

2. PROCEDURE

The Board has delegated the authority to the Department's Administrative Hearings Section to hear and decide all parole cases where nothing more than a modification of some sort is being sought in the first instance. The Board and its panels, however, do in one situation take a hand in modifying paroles. This happens where a case is brought up for a revocation hearing, and the Board or panel decides to continue the offender on parole. At this point, the Board or panel may modify the conditions of the offender's parole in whatever way it thinks will serve the best interests of society and the individual offender.

Except for this situation, the Board has left the matter of modifications to the Department's hearing officers. ~~In addition to being able to modify parole by imposing any additional condition of supervision that an agent could impose,~~ hearing officers can also choose from a long list of other intervention options. The hearing officer may do any of the following:

- Place the offender on Home Detention;
- Place the offender in a Halfway House;
- Order the offender to complete Public Service Employment;
- Order the offender to pay restitution (actual damages only) for violations committed while under supervision;
- ~~Place the offender on a higher, or a lower, level of supervision, including placement on intensive supervision;~~
- Restructure the offender's payment schedule;
- Restructure the payment schedule with, Board approval, on which the offender pays restitution;
- Recommend placement at a Restitution Center;
- Exempt or defer the offender's supervision fees;
- Modify any other special conditions of parole as may be appropriate under the circumstances.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Robert F. Spigner, Appellant,

v.

South Carolina Department of Probation, Parole and
Pardon Services, Respondent.

Appellate Case No. 2013-001380

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

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Submitted March 1, 2015 – Filed April 15, 2015
Withdrawn, Substituted and Refiled May 27, 2015

AFFIRMED IN PART AND REVERSED IN PART

Robert F. Spigner, pro se.

Tommy Evans, Jr., of the South Carolina Department of
Probation, Parole and Pardon Services, of Columbia, for
Respondent.

PER CURIAM: Robert F. Spigner appeals an order of the Administrative Law
Court (ALC) affirming the denial of his parole. Spigner argues the ALC erred by

(1) failing to find the parole board violated section 24-21-10(F)(1) of the South Carolina Code (Supp. 2014) because it failed to use COMPAS,¹ the risk assessment tool adopted by the South Carolina Department of Probation, Parole and Pardon Services (the Department), in reaching his parole decision; (2) failing to find the parole board violated his due process rights by reaching his parole decision before interviewing him; and (3) failing to find the parole board considered improper criteria in reaching his parole decision. Spigner also argues the ALC did not impartially consider his case. We affirm in part, reverse in part, and remand.²

1. We find section 24-21-10(F)(1) requires the parole board to evaluate an inmate's risk using the Department's adopted assessment tool in reaching a decision to grant or deny parole. *See* § 24-21-10(F)(1) ("The [D]epartment must develop a plan that includes the . . . establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, *which the parole board shall use in making parole decisions . . .*" (emphasis added)). Because the ALC failed to make this finding, its order is affected by an error of law. We therefore reverse as to this issue.³ *See James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 564, 566, 660 S.E.2d 288, 290 (Ct. App. 2008) ("Section 1-23-610 of the South Carolina Code . . . sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency."); S.C. Code Ann. § 1-23-610(B)(d) (Supp. 2014) ("The court of appeals . . . may reverse or modify the [ALC's] decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . affected by other error of law . . ."); *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 499, 661 S.E.2d 106, 112 (2008) (holding an inmate

¹ COMPAS is an acronym for "Correctional Offender Management Profiling for Alternative Sanctions."

² We decide this case without oral argument pursuant to Rule 215, SCACR.

³ In a petition for rehearing, the Department informed this court Spigner reappeared before the parole board on January 15, 2015. The Department stated Spigner was evaluated using COMPAS prior to the hearing and the parole board considered the evaluation in reaching its decision to deny his parole. As a result, we find it unnecessary to order a new parole hearing.

has a state-created liberty interest in requiring the parole board to adhere to statutory criteria in rendering a decision).

2. We find substantial evidence supports the ALC's finding the parole board did not reach a decision regarding Spigner's parole prior to his interview and hearing. See § 1-23-610(B) ("The court [of appeals] may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact."); § 1-23-610(B)(e) (holding this court may reverse or modify the ALC's finding of fact only if it affects a substantial right of the appellant and is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"). As a result, no due process violation occurred.

3. We affirm the ALC's finding the parole board did not consider any improper criteria in reaching Spigner's parole decision. See S.C. Code Ann. § 24-21-640 (Supp. 2014) ("The [parole] board must carefully consider the record of the prisoner *before, during, and after imprisonment . . .*" (emphasis added)); *id.* ("The [parole] board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records."); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) ("[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration."); *Clarendon Cnty. ex rel. Clarendon Cnty. Assessor v. TYKAT, Inc.*, 394 S.C. 21, 26 n.2, 714 S.E.2d 305, 308 n.2 (2011) (holding if the ALC fails to rule on an issue properly before it, a party must file a Rule 59(e), SCRCR, motion requesting such a ruling to preserve the issue on appeal).

⁴ The Department argues that under section 1-23-600(D) of the South Carolina Code (Supp. 2014), the ALC did not have jurisdiction to hear Spigner's appeal. See § 1-23-600(D) ("An administrative law judge shall not hear . . . an appeal involving the denial of parole to a potentially eligible inmate by [the Department]."). We disagree. See *Howard v. S.C. Dep't of Corr.*, 399 S.C. 618, 630, 733 S.E.2d 211, 218 (2012) ("[A] matter is reviewable by the ALC where an inmate's appeal *also* implicates a state-created liberty or property interest . . ."); *Cooper*, 377 S.C. at 499, 661 S.E.2d at 112 (holding an inmate has the right to require the parole board to adhere to statutory requirements in rendering a decision, and failure by the board to consider the requisite statutory criteria constitutes an infringement of a state-created liberty interest and warrants minimal due process procedures).

4. We find no evidence of bias by the ALC in this case. See *Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) ("The burden of proof is on the appellant to convince [an appellate court] that the lower court was in error."); *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009) ("It is not sufficient for a party . . . to simply allege bias; rather, the party must show some evidence of bias or prejudice." (internal quotation marks omitted)); *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) ("The fact a [court] ultimately rules against a litigant is not proof of prejudice by the [court], even if it is later held the [court] committed error in [its] rulings.").

AFFIRMED IN PART AND REVERSED IN PART.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

The South Carolina Court of Appeals

Robert F. Spigner, Appellant,

v.

South Carolina Department of Probation, Parole and Pardon Services, Respondent.

Appellate Case No. 2013-001380

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

Paul W. Thomas

J.

John D. Steele

J.

John D. Steele

J.

Columbia, South Carolina

cc: Robert F. Spigner, 65500
Tommy Evans, Jr., Esquire
Jana E. Shealy

FILED

May 27, 2015



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The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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May 27, 2015

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Broad River Correctional Institution
Columbia SC 29210

Mr. Tommy Evans, Jr., Esquire
PO Box 50666
Columbia SC 29250

Re: Robert Spigner v. SCDPPPS
Appellate Case No. 2013-001380

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in cursive script that reads "Jenny A. Kitchings" followed by a stylized initial "JK".

CLERK

cc: Jana E. Shealy

THE STATE OF SOUTH CAROLINA

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In The Supreme Court

JUN 29 2015

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson III

SC Court of Appeals

Opinion No. 2015-up-204

Filed May 27, 2015

Robert F. Spigner,.....Appellant,

v.

South Carolina Dept. of Probation, Parole and Pardon Services,.....Respondent.

CERTIFICATE OF SERVICE

Appellant declares that he mailed a copy of his APPENDIX to the parties listed below, by placing same in the U.S. Mail, addressed as below.

Clerk, South Carolina Supreme Court
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Columbia, S.C. 29211

Mr. Tommy Evans Jr. Esq.
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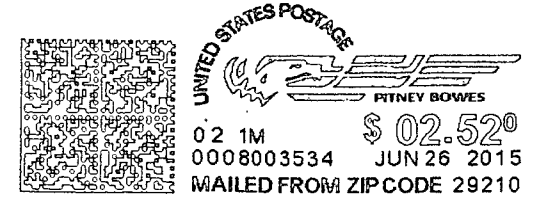
Handwritten signature of Robert F. Spigner

Robert F. Spigner, Pro se
Broad River Corr. Inst.
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Date: June 26, 2015

cc: File

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JUN 29 2015

SC Court of Appeals

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